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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 638.

ARGUS HOSIERY MILLS, INC., - - - Petitioner,

versus

RENSO ROBERTSON, - - - - - Respondent.

REPLY BRIEF IN BEHALF OF RESPONDENT FILED TO THE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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ARGUS HOSIERY MILLS, INC., - - - *Petitioner,*

v.

RENSO ROBERTSON, - - - - - *Respondent.*

REPLY BRIEF IN BEHALF OF RESPONDENT FILED TO THE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

REPLY TO PETITIONER'S PROPOSITION No. 1.

The petitioner, by proposition No. 1,[1] attempts to draw a distinction between the jurisdiction conferred by Congress on United States District Courts and powers conferred on Congress by the Constitution, with reference to the regulation of commerce, and wants this Court to hold that the "Fair Labor Standards Act of 1938" regulates activities in a zone in which Congress may legislate, but which the United States District Courts cannot adjudicate.

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[1]Petitioner's Brief, page 14.

The petitioner attempts to support this proposition upon the theory that the Constitution is liberally construed by the Courts, but the Judicial Code conferring jurisdiction upon the District Courts is strictly construed.

The rights sought to be enforced in this suit are created by the "Fair Labor Standards Act of 1938." In such suits jurisdiction is conferred upon courts of "competent jurisdiction,"[2] which under the Judicial Code[3] includes a United States District Court.

The pertinent part of Section 16 (b) of the Fair Labor Standards Act is as follows:

> "* * * action to recover such liability may be maintained in any Court of competent jurisdiction * * *."

The United States Constitution, Article I, Section 8, clause 3, says:

> "The Congress shall have power * * * to regulate commerce * * * among the states * * *."

The United States Judicial Code, Section 24, says:

> "The District Courts shall have original jurisdiction as follows:
>
> * * * * * *
>
> "(8) All suits and proceedings arising under any law regulating commerce * * *."
>
> *U. S. C., Title 28*, Sec. 41, Subsec. 8.

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[2]Section 16(b), Fair Labor Standards Act of 1938. U. S. C., Title 29, Section 216(b).

[3]Judicial Code, Section 24(8).

The Constitution and the Judicial Code used the same words in granting power to Congress and in conferring jurisdiction on the District Courts, the only difference being the tense of the verb "regulate."

Section 2 of the "Fair Labor Standards Act of 1938" is as follows:

> "(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetrate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.
>
> "(b) It is hereby declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power. June 25, 1938, c. 676, Section 2. 52 Stat. 1060."

U. S. C. A., Title 29, Sec. 202.

The foregoing quotation says the purpose of the Act is to regulate commerce.

The Circuit Court of Appeals held the Act was a regulation of commerce, saying:[4]

> "The express purpose of the statute is to regulate commerce among the several states through the elimination of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of the workers."

The "Fair Labor Standards Act of 1938" has been held to apply to an intrastate manufacturing business which substantially affects interstate commerce, because said Labor Act is a regulation of the kind of interstate commerce about which the Constitution grants to Congress the power to legislate.

U. S. v. *F. W. Darby Lumber Co.*, 312 U. S. 100, 85 L. Ed. 395, 61 S. Ct. 451.

The Judicial Code confers jurisdiction upon the United States District Courts to entertain suits involving rights under a United States statute which regulates the kind of interstate commerce about which the Constitution grants to Congress the power to regulate. The Judicial Code does not limit the categories of activities affecting interstate commerce in conferring jurisdiction on United States District Courts.

The Judicial Code does not limit the jurisdiction of the District Courts to matters involving the flow of

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[4]Record, page 22.

interstate commerce. The activities about which Congress can legislate and about which the District Courts may adjudicate do not have to be a part of the flow of interstate commerce.

The words in the Judicial Code "any law regulating commerce" would seem to be broad enough to include the adjudication of rights under a statute which involves activities substantially affecting interstate commerce.

The meaning of the words "any law regulating commerce" as used in the Judicial Code does not have a more narrow meaning than the words "to regulate commerce" as used in the Constitution because of the relationship in which these terms are used in the Judicial Code and the Constitution respectively.

Assuming that there is a different rule of construction, but not conceding this, a different rule of construction with reference to the Constitution and the statutes conferring jurisdiction on District Courts is not sufficient to show a different meaning of the same identical words. Counsel cites no authority for this proposition. Counsel does not point out, even with a strict construction of the statute, the principle to apply in holding that an activity affecting commerce, held to be regulating commerce, and, therefore, an activity about which Congress may legislate would also permit the courts to hold the rights under that Act did not arise under a law regulating commerce.

No authority, and we insist no good reason, has been advanced to indicate that Congress intended, in giving

jurisdiction to the District Courts, to limit that jurisdiction to a part of the activities affecting interstate commerce, and thus leave the enforcement of part of the activities regulating interstate commerce with the State Courts, involving forty-eight jurisdictions and interpretations.

THE JUDICIAL CODE, SECTION 24 (8) AS AMENDED, HAS BEEN HELD TO CONFER JURISDICTION UPON DISTRICT COURTS OF ALL SUITS ARISING UNDER THE LAWS OF THE UNITED STATES REGULATING COMMERCE.

Turner, Dennis & Lowery Lumber Co. v. *Chicago, M. & St. Rr. Co.,* 271 U. S. 259;
Mulford v. *Smith,* 307 U. S. 38, 57 S. Ct. 97.

THE UNITED STATES DISTRICT COURTS HAVE TAKEN JURISDICTION OF CONTROVERSIES INVOLVING THE "FAIR LABOR STANDARDS ACT OF 1938" BECAUSE IT IS A LAW REGULATING COMMERCE.

United States District Courts have held that the Fair Labor Standards Act is a regulating of interstate commerce, and that such Courts have jurisdiction under the Judicial Code, Section 24 (8), as amended, with the lone exception of the case at bar.

Campbell v. *Superior Decalcomania Inc.,* 31 F. Supp. 663;
Honore v. *Porto Rican Express Co.,* 32 F. Supp. 567;
Fishman v. *Marcouse,* 32 F. Supp. 460;

Lengel v. *The Newark News Dealers Supply Co.*, 32 F. Supp. 567;
Rogers v. *Glazier*, 32 F. Supp. 990;
Martin v. *Lane Oil and Gas Co.*, 36 F. Supp. 252;
Divine v. *Levy*, 36 F. Supp. 55;
Berger v. *Clouser*, 36 F. Supp. 168;
LeFevers v. *General Export Iron and Metal Co.*, 36 F. Supp. 838;
Stucker v. *Roselle*, 37 F. Supp. 864;
Townsend v. *Boston M. & Rr.*, 35 F. Supp. 938;
Farr v. *Smith Detective Agency and Night Watch Service*, 38 F. Supp. 105.

In the Fishman case, *supra*, the Court said:

"The Fair Labor Standards Act of 1938 is a law of the United States regulating commerce and the instant case is a suit or proceeding under that law. I, therefore, find that this Court has jurisdiction regardless of the citizenship of the parties and the amount involved."

In the Townsend case, *supra*, the Court said:

"Whenever a statute, enacted pursuant to the power of Congress to regulate interstate commerce, grants a right of property or of action and suit is brought to enforce that right, such a suit arises under the law creating the right within the meaning of the statute defining jurisdiction of the Federal Courts."

In the Farr case, *supra*, the Court said:

"I conceive this statute to be directed exclusively and wholly at interstate commerce, and the

national Courts are given jurisdiction over such controversies regardless of the amount involved."

The Sixth Circuit Court of Appeals, in deciding this case, said:

> "Assuming, but not deciding, that the statute conferring jurisdiction upon Federal Courts is construed more strictly than the commerce clause of the Constitution, Article I, Section 8, the fact remains that this action falls within the precise terms of Section 41, Subsection 8, Title 28, U. S. C."[5]

The Mulford case, *supra,* holds that a right existing under an Act of Congress which puts a limitation on the sale of tobacco for interstate commerce may be enforced in a Federal Court by virtue of the Judicial Code, Section 24 (8) because it regulates an activity which affects commerce by preventing tobacco grown under certain conditions from entering the stream of interstate commerce. In the case at bar we insist that the Court should hold that a right existing under the Fair Labor Standards Act which prohibits the production of goods for commerce under certain conditions may be enforced in a Federal Court by virtue of the Judicial Code, because the Act regulates an activity which affects commerce by preventing certain goods from entering the stream of commerce.

WHETHER A SUIT INVOLVING THE "FAIR LABOR STANDARDS ACT OF 1938" IS REMOVABLE FROM A STATE COURT TO A FEDERAL

[5]Record, pages 22, 23.

COURT IS IMMATERIAL TO THE ISSUES INVOLVED IN THE PETITION IN THE CASE AT BAR.

The question in the case at bar does not concern the removability of similar suits, but concerns the question as to whether or not a court of "competent jurisdiction" includes a United States District Court under the Judicial Code, Section 24 (8) as amended. If Congress had intended to give jurisdiction to suits involving under $3,000.00 to the State Courts exclusively and to the Federal Courts exclusively suits involving more than $3,000.00, undoubtedly Congress would have so said. Evidently Congress intended that the employees might choose the forum and institute the suit in the court which was most convenient. If employees were forced to bring suits involving less than $3,000.00 in the State Court and more than $3,000.00 in the Federal Court the employee would have no choice.

REPLY TO PETITIONER'S PROPOSITION No. 2.

By proposition No. 2,[6] the petitioner asked to have this Court hold that in a representative suit under the Fair Labor Standards Act the sum of two or more claims of the employees amounting to more than $3,000.00 does not give jurisdiction to the United States District Court under the Judicial Code, Section 24 (1) (a).

Petitioner, in order to support this proposition, insists that the claims of the employees are separate and

[6]Petitioner's Brief, page 24.

distinct, and that the claims of separate and distinct individuals cannot be added in order to confer jurisdiction.

This Court has held where the plaintiff holds title to the claims, even though as trustee, that the suing plaintiff may consider the aggregate value of the claims in order to establish jurisdiction in the United States District Courts. The title to the claims was held by an assignment in trust to the plaintiff.

Bullard v. *Cisco,* 290 U. S. 177, 54 S. Ct. 179.

The cases cited by petitioner,[7] holding that the aggregate of separate and distinct claims cannot be added in order to confer jurisdiction on the Federal Courts, do not seem to be in point, because in the suit at bar the right of the plaintiff to sue for other employees similarly situated is a right created by the statute.

This is not a case where several parties holding claims under $3,000.00 combine together in a suit for the purpose of making the claim of sufficient amount to confer jurisdiction in the Federal Courts. In the case at bar Congress combined the claims of all the employees, at least for the purpose of prosecuting the suit to a judgment. The decree in favor of the plaintiff should be in his name and all other employees similarly situated, and later each may establish the amount of his individual claim. The claims of all are combined for the purpose of obtaining a judgment. The final judgment will be the total amount payable by the de-

[7]Petitioner's Brief, pages 25, 26.

fendant to the suing employee and those for whom he sues.

Under Section 24 1-a of the Judicial Code,[8] jurisdiction is conferred if "the matter in controversy exceeds $3,000.00." The matter in controversy is the amount of the judgment against the defendant which the suing employee may obtain for himself and other employees similarly situated. The amount in controversy is the amount due the employees. Congress, in the Act, by providing that one employee might sue for himself and all others, combined the claims of all employees so far as to make the total due all employees as the amount in controversy.

REPLY TO THE CONCLUDING ARGUMENT OF PETITIONER'S BRIEF.[9]

The question as to whether the complaint alleges that the suing employee and those for whom he sues are engaged in interstate commerce or the production of goods for interstate commerce was not raised by the petitioner in the trial Court.[10]

This question was not called to the attention of the Circuit Court of Appeals.[11]

Neither the Circuit Court of Appeals nor the trial Court will be reversed upon a question which was not called to their attention.

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[8]Copied in Petitioner's Brief, page 24.
[9]Petitioner's Brief, page 27.
[10]See Motion to Dismiss Action in Trial Court, Record, page 6.
See Trial Court's Opinion, Record, page 7.
See Petition to Rehear, Record, page 10.
See Trial Court's Opinion on Petition to Rehear, Record, page 12.
[11]See Opinion Circuit Court of Appeals, Record, page 21.

Even though the petition should contain an allegation that the suing employee and those for whom he sues are engaged in commerce or in the production of goods for commerce, the suing employee is entitled to amend his complaint. This amendment could be made upon the remand to the trial Court. Whether such an allegation was made does not affect the questions presented to this Court.[12]

It is respectfully submitted that the decision of the Circuit Court of Appeals is correct, and that the petition for a writ of *certiorari* should be denied.

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Attorney for Respondent.

Herbert G. B. King,
Of Counsel.

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[12]See Petitioner's Specification of Errors, Record, pages 10, 11.